Supreme Court, U.S.
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No. 95-652

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

SARAH A. KIRK, Administratrix of the Estate of KIRK, ALFRED T., deceased, and KIRK, SARAH A., in her own right,

Petitioners,

v.

RAYMARK INDUSTRIES INC.; EAGLE-PICHER INDUSTRIES, INC.; KEENE CORPORATION; GARLOCK INC.; OWENS-CORNING FIBERGLAS CORPORATION; CELOTEX CORPORATION; GAF CORPORATION; OWENS-ILLINOIS GLASS COMPANY

OWENS-CORNING FIBERGLAS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENT OWENS-CORNING FIBERGLAS CORPORATION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly applied this Court's longstanding rule that denial of a party's statutory right to utilize all of the peremptory challenges allowed by federal law constitutes reversible error.

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BRIEF OF RESPONDENT OWENS-CORNING FIBERGLAS CORPORATION IN OPPOSITION

Respondent Owens-Corning Fiberglas Corporation ("Owens-Corning") respectfully submits this brief in opposition to the petition for a writ of certiorari.

STATEMENT

I. Proceedings In The District Court

Alfred Kirk ("decedent") died in 1988 of mesothelioma, a cancer of the lung lining believed to be caused by exposure to asbestos fibers. Sarah Kirk, on her own behalf and as administratrix of decedent's es-

tate, sued several former asbestos manufacturers, including Owens-Corning. Pet. App. 4a-5a. Owens-Corning formerly manufactured and distributed an asbestos-containing insulation product known as Kaylo.

The case was tried to a jury in the United States District Court for the Eastern District of Pennsylvania. During jury selection, Owens-Corning challenged for cause two prospective jurors whose answers to voir dire questions demonstrated beyond any conceivable doubt their inability to resolve the case in a fair and impartial manner. Nonetheless, the district court denied the challenges for cause, compelling Owens-Corning to use two of its three peremptory challenges to remove those two biased jurors. Pet. App. 3a, 5a.

The trial was "reverse-bifurcated," with medical causation and damages tried in the first phase and liability tried in the second phase, both to the same jury. At the conclusion of the first phase, the jury returned a verdict for petitioners in excess of $2 million. Pet. App. 6a.

During the liability phase, Owens-Corning offered evidence demonstrating that the overwhelming majority of asbestos-induced mesotheliomas are caused by crocidolite, a type of asbestos that was not found in Owens-Corning's Kaylo product. Over Owens-Corning's objection, petitioners were permitted to rebut this evidence by reading to the jury the prior trial testimony of Dr. Louis Burgher, who had testified as an expert witness for Owens-Corning in an unrelated case. Dr. Burgher's testimony stated that mesothelioma could be caused by forms of asbestos other than crocidolite. Pet. App. 27a-28a.

Part of Owens-Corning's defense at trial was its assertion that all or part of decedent's injury was caused by exposure to asbestos-containing products made by Garlock Inc., a defendant who had settled with petitioners prior to trial. The district court permitted petitioners to rebut Owens-Corning's showing in this regard by reading to the jury an interrogatory response prepared by Garlock when it was still a party to the action. The interrogatory response stated that Garlock's products did not emit "meaningful levels of asbestos dust and fibers." Pet. App. 34a-35a.

At the conclusion of the liability phase, the jury returned a verdict against Owens-Corning. The jury also found that decedent had not been exposed to asbestos dust from any product manufactured by Garlock. Pet. App. 6a.

Owens-Corning filed a motion for a new trial, challenging, *inter alia*, the district court's failure to strike the two prospective jurors for cause and the court's improper admission of prejudicial hearsay evidence (*i.e.*, Dr. Burgher's testimony and the Garlock interrogatory response). The district court denied the motion. The district court also awarded petitioners an additional $520,000 as "delay" damages under Pennsylvania law. Pet. App. 6a.

II. Proceedings In The Court Of Appeals

The court of appeals reversed and remanded for a new trial. Pet. App. 2a-43a. The court first held that the district court erred in denying Owens-Corning's two challenges for cause. The court explained that prospective juror 251 had "inhaled a considerable amount of asbestos, knew people who were suffering

from asbestos-related diseases, and thought himself likely to succumb to some asbestos-related disease in the future." Pet. App. 14a. Prospective juror 45 had admitted "that he was biased against asbestos companies and felt that it was immoral knowingly to produce harmful and defective products." *Id.* Concluding that these jurors "could not serve fairly and impartially in light of their past experiences and personal biases," the court held that these two jurors should have been dismissed for cause. *Id.* at 15a.

As the court of appeals observed, the erroneous denial of Owens-Corning's challenges for cause compelled Owens-Corning to use two of its peremptory strikes to prevent these biased jurors from serving on the jury. Pet. App. 15a. The court rejected petitioners' claim that Owens-Corning had waived its right to complain about this violation of its statutory right to exercise three peremptory challenges. The court found that Owens-Corning had adequately preserved that issue for appellate review, *id.* at 15a-17a, and had "fairly place[d] before [the court of appeals] the question of whether a statutory right to peremptory challenges has been violated." *Id.* at 17a.

The court next held that Owens-Corning's statutory right to exercise three peremptory challenges under 28 U.S.C. § 1870 was violated when Owens-Corning was forced to expend two of its peremptory challenges striking jurors who should have been removed for cause. Noting that this Court, in *Ross v. Oklahoma*, 487 U.S. 81, 91 n.4 (1988), had specifically declined to resolve that issue, the court of appeals concluded that under the circumstances of this case, "Owens-Corning's statutory right to three peremptory chal-

lenges was impaired." Pet. App. 17a.

The court of appeals also concluded that a new trial was required in order to remedy the violation of Owens-Corning's statutory rights. The court pointed to an unbroken line of precedent in this Court requiring that remedy when a party's right to exercise the statutory number of peremptory challenges is improperly denied. Pet. App. 18a-21a (citing *Swain v. Alabama*, 380 U.S. 202 (1965), *overruled in part on other grounds*, *Batson v. Kentucky*, 476 U.S. 79 (1986); *Harrison v. United States*, 163 U.S. 140, 141 (1896); *Gulf, Colo. & Santa Fe Ry. Co. v. Shane*, 157 U.S. 348, 351 (1895); *Lewis v. United States*, 146 U.S. 370, 375-77 (1892)).

The court of appeals rejected petitioners' argument that *Ross v. Oklahoma* requires a different result. The court explained that the issue in *Ross* was whether the "wasting" of a peremptory challenge due to the trial court's erroneous denial of a for-cause challenge constitutes a violation of the Sixth and Fourteenth Amendment right to an impartial jury. Pet. App. 21a. The *Ross* Court found no violation of that constitutional right because there was no evidence that any individual who actually sat on the jury was biased. *Id.* at 21a-22a. Noting that the *Ross* Court specifically distinguished the constitutional right to an impartial jury from the statutory right to exercise peremptory challenges, the court of appeals concluded that "*Ross* is not controlling . . . because Owens-Corning alleges a *statutory*, not a constitutional, injury." *Id.* at 22a (emphasis in original).

The court also observed that numerous other courts

of appeals have reached the same conclusion. Pet. App. 23a-24a (citing *United States v. Cambara*, 902 F.2d 144, 147-48 (1st Cir. 1990); *Carr v. Watts*, 597 F.2d 830, 833 (2d Cir. 1979); *United States v. Rucker*, 557 F.2d 1046, 1049 (4th Cir. 1977); *United States v. Nell*, 526 F.2d 1223, 1229 (5th Cir. 1976)). Moreover, the court rejected petitioners' reliance on cases addressing the constitutional implications of an improper denial of one or more peremptory challenges. Pet. App. 25a-27a. Noting "the key distinction between violation of the constitutional right to an impartial jury and the deprivation of the federal statutory right to peremptory challenges," *id.* at 26a n.16, the court of appeals found those cases clearly distinguishable.

The court of appeals next addressed Owen-Corning's contention that the district court erred in permitting petitioners to read to the jury the prior trial testimony of Dr. Louis Burgher. Dr. Burgher had testified as an expert witness for Owens-Corning in an unrelated case, and petitioners offered his testimony to rebut Owens-Corning's showing that its Kaylo product could not have caused decedent's mesothelioma. The court of appeals concluded that Dr. Burgher's testimony was inadmissible hearsay. The court reasoned that this testimony was not an admission of a party opponent because expert witnesses are generally not authorized to make admissions on behalf of the party calling them. Pet. App. 28a-31a. Moreover, the testimony did not fall within the hearsay exception for former testimony because there was no showing that Dr. Burgher was unavailable to testify or that Owens-Corning had an opportunity and similar motive to develop Dr.

Burgher's testimony at the prior trial. Pet. App. 31a-34a (citing Fed. R. Evid. 804(b)(1)).

Accordingly, the court of appeals concluded that the district court erred in admitting Dr. Burgher's testimony. Because a remand was required in any event to remedy the improper denial of Owens-Corning's peremptory challenges, the court did not address petitioners' contention that the improper admission of this testimony was "harmless error." Pet. App. 28a n.18.

Finally, the court of appeals considered Owens-Corning's claim that the district court erred in permitting petitioners to read to the jury an interrogatory response prepared by Owens-Corning's former co-defendant, Garlock, Inc. The interrogatory response stated that Garlock products "do not . . . emit meaningful levels of asbestos dust and fibers," and petitioners offered this evidence to rebut Owens-Corning's contention that decedent's injuries were caused in whole or in part by Garlock's products rather than by Owens-Corning's Kaylo product. Pet. App. 34a-35a. The court of appeals held that this interrogatory response was hearsay when offered against Owens-Corning and did not fall within the "catch-all" exception set forth in Fed. R. Evid. 803(24). Pet. App. 35a-37a. Accordingly, the court of appeals concluded that "the district court erred in admitting this evidence." *Id.* at 37a.

REASONS FOR DENYING THE WRIT

I. Review Is Not Warranted Because The Decision Below Is Interlocutory

As this Court has repeatedly made clear, a writ of certiorari will generally not issue to review an inter-

locutory judgment. *See, e.g., Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostock R.R. Co.*, 389 U.S. 327, 328 (1967); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *American Constr. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 384 (1893); *see also Virginia Military Inst. v. United States*, 113 S. Ct. 2431 (1993) (Scalia, J., concurring in denial of certiorari); R. Stern, E. Gressman, S. Shapiro, & K. Geller, SUPREME COURT PRACTICE § 4.18 (7th ed. 1993) (hereinafter "SUPREME COURT PRACTICE"). "[E]xcept in extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe*, 240 U.S. at 258.

The judgment in this case is plainly interlocutory. The court of appeals reversed the judgment of the district court on multiple grounds and remanded the case for a new trial on liability and damages. The outcome of that trial may well eliminate any possible need for further consideration of the question raised in the petition. Thus, it would be premature for the Court to address that question at this time.

Nor are there any special or extraordinary circumstances that would justify an exception to the general rule in this case. The question presented in the petition is not fundamental to the further conduct of the case, *cf. United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945), it does not go to the subject matter jurisdiction of the lower courts, *cf. Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 52 (1938), and it does not involve a denial of petitioners' right to a jury trial, *cf. Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959). Accordingly, the petition should be denied by reason of the interlocutory nature of the judg-

ment below. As the Court explained in *Brotherhood of Locomotive Firemen*, 389 U.S. at 328, "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court."

II. Review Is Not Warranted Because The Judgment Below Is Supported By Multiple Alternative Grounds

Interlocutory review would be particularly inappropriate in this case, because Owens-Corning is entitled to a new trial for reasons wholly independent of the question presented in the petition. The court of appeals held that the district court erred in permitting the jury to hear the inadmissible hearsay evidence proffered by petitioners, and petitioners have not sought review of that holding. As a result, that holding is the law of this case and a new trial is necessary even without regard to the district court's improper denial of Owens-Corning's right to exercise its peremptory challenges. Accordingly, review at this stage of the case would not obviate the need for further proceedings below, and intervention by the Court at this point would be wasteful of judicial resources and inconsistent with orderly judicial process.[1]

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[1]The evidentiary errors identified by the court of appeals occurred in the liability phase of the trial, and petitioners would no doubt contend that a new trial could be limited to the issue of liability if the Court were to grant certiorari and reverse the judgment below. Even that highly speculative and unlikely outcome would be judicially inefficient, however, because a jury asked to decide the liability issue alone would nonetheless be required to hear much of the same evidence that would otherwise be introduced in

[Footnote continued on next page]

To be sure, the court of appeals did not address the question whether the erroneous admission of Dr. Burgher's testimony was harmless error. Pet. App. 28a n.18. There can be no doubt, however, that petitioners' use of that testimony was highly prejudicial to Owens-Corning and that this Court would so find. As the court of appeals observed, petitioners used Dr. Burgher's testimony to undermine the testimony of Owens-Corning's medical expert in this case "by revealing to the jury that Owens-Corning's expert witness in a previous case voiced a different and contradictory opinion as to which asbestos fibers cause" injuries like decedent's. *Id.* at 28a.

The prejudicial impact of such evidence is readily apparent. The fact that Owens-Corning had offered Dr. Burgher as an expert in another case no doubt led the jury to give his testimony extra weight in judging the credibility of Owens-Corning's arguments in this case. Moreover, his testimony went directly to a central question in the case, namely, whether Owens-Corning's Kaylo product contained asbestos fibers of a type that caused decedent's injuries. Petitioners clearly recognized the prejudicial impact of this evidence, emphasizing it to the jury in both opening and closing argument. *See* Supplement Mem. of Law of Defendant

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[Footnote continued from previous page]

the damages phase. Moreover, as noted *infra*, a new trial on damages would likely be required in any event because of the excessiveness of the jury's damages verdict.

Owens-Corning Fiberglas Corp. in Support of its Motion for a New Trial at 7 (citing 12/20/93 Tr. 45-46; 12/22/93 Tr. 74-76). Indeed, petitioners confirmed the impact of this testimony by informing the jury that "[p]erhaps most importantly though was Doctor Louis Burgher, the gentleman from Omaha, Nebraska who I also read his testimony to you [*sic*]." *Id.*

Likewise, petitioners' improper reliance on the interrogatory response submitted by former defendant Garlock was highly prejudicial. Owens-Corning had offered testimony that Garlock products were present at a particular work site during the years that decedent worked there, providing strong support for the conclusion that decedent's injuries were wholly or partially caused by Garlock rather than by Owens-Corning. Had the jury accepted that claim, Owens-Corning would have "eliminate[d] or substantially reduce[d] its liability." Pet. App. 35a. Instead, however, petitioners were improperly permitted to read to the jury Garlock's self-serving hearsay statement that its products "do not . . . emit meaningful levels of asbestos dust." *Id.* And once again, petitioners recognized and heightened the prejudicial impact of this inadmissible evidence by emphasizing it to the jury during closing argument. *Id.*

Accordingly, the evidentiary errors identified by the court of appeals cannot be dismissed as harmless. A new trial is therefore required for reasons entirely independent of the district court's error in denying Owens-Corning's statutory right to exercise its peremptory challenges.

In addition to the evidentiary errors addressed by the

court of appeals, Owens-Corning also raised further challenges to the district court judgment, including a claim that the jury's damages verdict was excessive as a matter of law. In view of its disposition of the case, the court of appeals did not address that question. Pet. App. 4a n.1. That issue provides yet another ground for Owens-Corning's defense of the judgment below, however, and further demonstrates that the question on which petitioners seek review is not squarely or necessarily presented at this interlocutory stage of the litigation. Given the multiple independent grounds for requiring a new trial in this case, review at this stage would be inappropriate and wasteful of scarce judicial resources. *See* SUPREME COURT PRACTICE § 4.4, at 173.

III. Review Is Not Warranted Because The Decision Below Is Consistent With This Court's Precedents And The Alleged Circuit Conflict Is Insignificant, Of Recent Vintage, And Likely To Be Resolved Without Intervention By This Court

As the court of appeals recognized below, this Court has already resolved the question presented in the petition. The Court observed in *Swain v. Alabama*, 380 U.S. 202 (1965), *overruled in part on other grounds*, *Batson v. Kentucky*, 476 U.S. 79 (1986), that "[t]he denial or impairment of the right [to exercise peremptory challenges] is reversible error without a showing of prejudice." 380 U.S. at 219. *See also Ross v. Oklahoma*, 487 U.S. 81, 89 (1988) (quoting *Swain*). That proposition is supported by a long line of precedent, and has never been challenged by this Court. *See Harrison v. United States*, 163 U.S. 140 (1896); *Gulf,*

Colo. & Santa Fe Ry. Co. v. Shane, 157 U.S. 348, 351 (1895) ("That to thus empanel a jury in violation of law, and in such a way as to deprive a party of his right to peremptory challenge, constitutes reversible error is clear."); *see also Lewis v. United States*, 146 U.S. 370, 376 (1892); *Stroud v. United States*, 251 U.S. 380, 381-82 (1920).

Petitioners nonetheless contend that interlocutory review of this question is warranted because the decision below conflicts with two recent decisions of other circuits. *See* Pet. 4-6 (citing *United States v. Annigoni*, 68 F.3d 279 (9th Cir. 1995); *Getter v. Wal-Mart Stores, Inc.*, 66 F.3d 1119 (10th Cir. 1995)). To the contrary, however, the alleged circuit conflict identified by petitioners does not justify further review at this time. That conflict involves only two other cases, both of which were decided only a few months ago. Thus, review by this Court would be premature, because further percolation of this issue among the courts of appeals may ultimately reveal a consensus and eliminate any need for this Court's intervention.

Indeed, there is considerable reason to doubt the longevity of the decisions relied upon by petitioners. The Tenth Circuit's opinion in *Getter*, for example, contains no recognition of the fact that numerous decisions of this Court are directly inconsistent with the result reached in that case. Moreover, that case was decided by a divided panel, over a strong dissent. 66 F.3d at 1125-30. Thus, the Tenth Circuit may well be persuaded to reexamine *Getter* in a future case in which it addresses the binding precedential weight of this Court's decisions in *Harrison*, *Shane*, and the other cases cited above.

Nor does the Ninth Circuit's decision in *Annigoni* establish the need for interlocutory review in this case. That decision is so recent that a petition for rehearing and suggestion of rehearing in banc were still pending when this brief in opposition was filed. In fact, the Ninth Circuit has called for and received a response to the petition and suggestion, indicating that it may already be reexamining its decision, which (as the *Annigoni* panel conceded) is contrary to Ninth Circuit precedent. *See* 68 F.3d at 283 (citing *United States v. Turner*, 558 F.2d 535, 538 (9th Cir. 1977)).

In any event, the *Annigoni* decision is unlikely to spawn imitators, because it badly misreads this Court's precedents in a number of respects. In the first place, the *Annigoni* panel gave short shrift to the precedents of this Court that are discussed above, even though the panel recognized that those precedents require reversal when the right to exercise a peremptory challenge is improperly denied. 68 F.3d at 283. The panel concluded that it was not bound by those decisions because, in its view, more recent precedents of this Court point in a different direction. *Id.* at 283-85. But this Court has expressly forbidden the courts of appeals to follow that approach: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). The *Annigoni* panel was apparently unaware of that explicit command, but other courts are unlikely to repeat the panel's error, even in the improbable

event that they conclude that more recent precedent in this Court casts doubt on the longstanding rule embraced by the court of appeals in this case.

The *Annigoni* panel also erred in its analysis of those decisions of this Court that it does purport to follow. The panel relied on *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1717 (1993), for the proposition that "any error" other than "structural" errors "may be assessed for its harmfulness," and concluded that the wrongful denial of peremptory challenges is not "structural" because it does not violate the constitutional right to an impartial jury. 68 F.3d at 284-85. That analysis reflects a clear misreading of *Brecht*. The *Brecht* Court explained that harmless-error analysis applies to "*trial* error" -- *i.e.*, error that "'occur[s] during the presentation of the case to the jury,' and is amenable to harmless-error analysis because it 'may . . . be quantitatively assessed in the context of other evidence presented in order to determine [the effect it had on the trial].'" 113 S. Ct. at 1717 (emphasis added; citation omitted). The Court expressly distinguished such "trial" error from structural defects that "'defy analysis by "harmless-error" standards.'" *Id.*

Denial of a party's right to exercise peremptory challenges is not "trial" error under *Brecht*, because it does not occur "'during the presentation of the case to the jury'" and its impact cannot possibly be assessed by reference to the evidence presented at trial. Rather, it affects the entire trial but "def[ies] analysis by harmless-error standards." Thus, it constitutes precisely the sort of error that is not susceptible of harmless-error analysis under *Brecht*.

The *Annigoni* panel (like the Tenth Circuit in *Getter*) also erred in relying on this Court's decision in *Ross v. Oklahoma*, 487 U.S. 81 (1988), as support for its conclusion. *Annigoni*, 68 F.3d at 285; *see Getter*, 66 F.3d at 1122-23. As the court of appeals correctly explained below, *Ross* simply does not change prior law regarding the proper remedy for denial of the statutory right to exercise peremptory challenges. The question presented in *Ross* was whether the Sixth and Fourteenth Amendment right to an impartial jury is violated when a defendant is forced to use a peremptory challenge to remove a biased juror. The Court concluded that no constitutional violation occurs in that circumstance because the right at issue guarantees only "an impartial jury," not the unconstrained use of a defendant's peremptory challenges. 487 U.S. at 85-88. Thus, no remedy was required, because no constitutional violation had been committed. *Ross*'s reasoning is limited by the nature of the right asserted in that case, and has no application to cases involving the very different right to exercise peremptory challenges.[2]

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[2]By the same token, the ruling below does not conflict with the numerous decisions holding that the constitutional right to an impartial jury is not violated in the absence of prejudice to the defendant. *See, e.g., United States v. Alexander*, 48 F.3d 1477, 1483-84 (9th Cir.), *cert. denied*, 116 S. Ct. 210 (1995); *United States v. Beasley*, 48 F.3d 262, 265-66 (7th Cir. 1995); *Bannister v. Armontrout*, 4 F.3d 1434, 1443 (8th Cir. 1993), *cert. denied*, 115 S. Ct. 418 (1994); *Callins v. Collins*, 998 F.2d 269, 277 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1127 (1994); *Heath v. Jones*, 941 F.2d 1126, 1132-33 (11th Cir. 1991), *cert. denied*, 502 U.S. 1077

[Footnote continued on next page]

If anything, *Ross* provides support for the decision below, not for the contrary results reached in *Annigoni* and *Getter*. The *Ross* Court specifically pointed to *Swain*'s statement that, in federal cases, "'[t]he denial or impairment of the right [to exercise peremptory challenges] is reversible error without a showing of prejudice.'" 487 U.S. at 89. Recognizing that this rule was not directly applicable in the case before it, which involved a *state* court trial, the *Ross* Court nonetheless assumed without deciding that the same rule might apply in state cases as a matter of due process. *Id.* The Court did not ultimately resolve that question, because the defendant in *Ross* had suffered no deprivation of his right to exercise peremptory challenges as defined by state law. *Id.* at 89-91. Nonetheless, the *Ross* Court's quotation (without any indication of disapproval) of the rule set forth in *Swain*, and its willingness to assume that that rule might even extend to state courts as a matter of due process, certainly runs contrary to the suggestion that *Ross* changed settled law in this area.

For all these reasons, the Ninth and Tenth Circuits' decisions in *Annigoni* and *Getter* are unlikely to be followed by other courts of appeals, and may ultimately be reconsidered and corrected by those circuits.

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(1992); *United States v. Farmer*, 923 F.2d 1557, 1566 (11th Cir. 1991); *Gaskins v. McKellar*, 916 F.2d 941, 948-49 (4th Cir. 1990), *cert. denied*, 500 U.S. 961 (1991).

Review by this Court is therefore not warranted at this time.

Finally, petitioners err in asserting that failure to grant review in this case will "result in a flood of new trials." Pet. 6. The rule applied by the court of appeals in this case has been followed by the federal courts for more than 100 years, with no apparent ill effects. The decision below cites only a handful of cases in which this rule has led to reversal and a new trial, and petitioners point to no evidence for the assertion that the number of such cases is in fact so large as to lead to serious consequences. In short, the decision below is consistent with settled practice in the federal courts, and further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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